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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Marc Wichansky,

10 Plaintiff,

11 v.

12 Sean Callagy, et al.,

13 Defendants.
14

No. CV-23-01904-PHX-MTL

ORDER

15 **I.**

16 Plaintiff Marc Wichansky sues his former attorneys for breach of fiduciary duty and
17 constructive fraud.

18 Plaintiff, who was represented by Defendants, obtained a \$27 million jury verdict
19 against his former business partner. (Doc. 1-1 ¶ 26.) The former business partner threatened
20 bankruptcy, so the parties mediated the dispute and Plaintiff accepted \$18 million to settle
21 his claims. (*Id.* ¶¶ 28-31.)

22 Then, Plaintiff and his spouse divorced, and both became subject to a property
23 settlement agreement entered by the Arizona Superior Court. (*Id.* ¶¶ 36-39.) For his divorce
24 proceedings, Plaintiff was represented by a different law firm and lawyer. (Doc. 21-1 ¶¶ 15-
25 16.)

26 The Superior Court entered its divorce decree, which incorporated the property
27 settlement agreement. Plaintiff then sought counsel from Defendants to determine much
28 money his ex-wife was entitled to receive from the \$18 million settlement under the divorce

1 decree. (Doc. 1-1 ¶¶ 52-59.) This question necessarily implicated the terms of the property
 2 settlement agreement. Acting on Defendants’ advice, Plaintiff alleges that Defendants’
 3 counsel was in error and, as a result, he did not leave enough funds for his ex-spouse as
 4 required by the property settlement agreement. (*Id.* ¶¶ 60-61.) The Superior Court found
 5 that Plaintiff violated its decree and ordered him to pay almost \$300,000 in interest. (*Id.*)

6 Plaintiff filed his case in Arizona Superior Court alleging breach of fiduciary duty
 7 and constructive fraud. Defendants removed the action to this Court. Pending is
 8 Defendants’ Motion to Transfer Venue to the District of New Jersey. Defendants contend
 9 that, because of a forum-selection clause in various legal engagement agreements, Plaintiff
 10 has consented venue in New Jersey. (Doc. 15 at 2.) Plaintiff opposes the Motion, arguing
 11 that there is no enforceable forum selection clause that governs the claims asserted in this
 12 case.

13 II.

14 A defendant seeking to enforce a forum-selection clause may object to the venue
 15 chosen by plaintiff and move to transfer the case. Under 28 U.S.C. § 1404(a), “[f]or the
 16 convenience of parties and witnesses, in the interest of justice, a district court may transfer
 17 any civil action to any other district or division where it might have been brought”
 18 “Forum selection clauses are presumed valid and should be enforced unless doing so
 19 clearly would be ‘unreasonable and unjust, or the clause was invalid for such reasons as
 20 fraud or overreaching.’” *Aimsley Enters. Inc. v. Merryman*, No. 19-CV-2101-YGR, 2020
 21 WL 1677330, at *5 (N.D. Cal. Apr. 6, 2020) (quoting *Atl. Marine Const. Co. v. U.S. Dist.*
 22 *Court for W. Dist. of Texas*, 571 U.S. 49, 62-63 (2013)).

23 Well-established judicial policy favors the enforcement of forum selection clauses
 24 as representations of the parties’ bargaining and mutual expectations. And a plaintiff bears
 25 the heavy burden “to show why the court should not enforce the forum selection clause.”
 26 *Id.*; see also *Yei A. Sun v. Advanced China Healthcare, Inc.*, 901 F.3d 1081, 1084 (9th Cir.
 27 2018) (affirming the dismissal of a complaint because a plaintiff did not carry “their heavy
 28 burden of showing the sort of exceptional circumstances that would justify disregarding a

forum-selection clause”).

III.

A.

The Court’s first task is to determine whether a contractually valid forum-selection clause exists. *Pierman v. Stryker Corp.*, No. 3:19-cv-00679-BEN-MDD, 2020 WL 406679, at *2 (S.D. Cal. January 24, 2020). “When deciding whether the parties agreed to a certain matter, courts generally . . . should apply ordinary state-law principles that govern the formation of contracts. Consent is an essential element of any contract, and must be free, mutual and communicated.” *Moretti v. Hertz Corp.*, No. C 13-02972-JSW, 2014 WL 1410432, at *2 (N.D. Cal. Apr. 11, 2014).

Defendants produce three engagement agreements between themselves and Plaintiff. The first, from May 2011, is between Plaintiff and the Law Office of Sean R. Callagy, Esq., LLC. (Doc. 15-1.) Both parties signed this agreement. This agreement does not include a forum selection clause. This engagement agreement therefore cannot compel the relief Defendants seek.

Next, Defendants produce a May 11, 2015 engagement agreement between those same parties. (Doc. 15-2.) The scope of this agreement is defined as providing legal representation for Plaintiff in eight identified lawsuits. Many were cases pending against his former business partner. This agreement includes a forum-selection clause:

[The] Parties agree that any disputes that arise out of this Agreement will be resolved according to the laws of the State of New Jersey and the trier of fact shall award attorneys fees to the prevailing party. Client consents to *in personam* jurisdiction in New Jersey and agrees that venue shall be in Bergen County, New Jersey.

(Doc. 15-2 at 3.)

Plaintiff signed this agreement. But it was not countersigned by a representative of the Law Office of Sean R. Callagy, Esq.

The third is an amended agreement between Plaintiff and Callagy Law dated

1 January 1, 2016. (Doc. 15-3.) This became necessary when Plaintiff could not pay
2 Defendants' fees, and the amendment restructured Plaintiff's payment obligations. (*Id.* at
3 1-2.) While the text of the agreement mentions Callagy Law, it is on Sean R. Callagy, Esq.
4 LLC letterhead. The document provided to the Court is not signed by either party. The
5 amended agreement includes a forum-selection clause—"Parties agree that any disputes
6 that arise out of this Agreement will be resolved according to the laws of the State of New
7 Jersey. Client consents to *in personam* jurisdiction in New Jersey and agrees that venue
8 shall be in Bergen County, New Jersey." (*Id.* at 5.)

9 Plaintiff argues that two of the forum selection clauses are unenforceable because
10 they are contained in engagement agreements between him and a different law firm, the
11 Law Office of Sean R. Callagy, Esq. The Court rejects this argument. The record shows
12 that, throughout legal representation, the Law Office of Sean R. Callagy became Callagy
13 Law. One of Plaintiff's former lawyers, Michael Smikun, explained that "[i]n or around
14 early 2015, . . . The Law Office of Sean R. Callagy, Esq. LLC was going to be wound down
15 and we would begin representing clients under the entity Callagy Law, P.C." (Doc. 21-1
16 ¶ 5.) Defendants continued to perform legal work for Plaintiff without interruption. (*Id.*
17 ("There was no interruption of services from my perspective, as all of the firm's attorneys,
18 staff, and office location remained unchanged.")) The same lawyers continued their
19 representation of Plaintiff on the same cases, including the litigation between Plaintiff and
20 his former business partner. Plaintiff was advised of this change, and he did not seem to
21 mind. (*Id.* ¶¶ 8-9.)

22 Plaintiff next contends that the 2016 amended engagement agreement cannot be
23 enforced because he did not sign it. Defendants argue that, even though he did not sign the
24 engagement agreement, Plaintiff cannot now deny its terms because he continued to accept
25 their legal services. Indeed, Defendants argue that Plaintiff "never objected to or
26 questioned [the forum selection clause's] relevance throughout their longstanding
27 relationship while otherwise acting in accordance with the engagement contracts." (Doc.
28 21 at 4 (citing *Borough of Point Pleasant Beach v. J.C. Williams Co.*, 270 A.2d 275, 276

1 (N.J. 1970).)

2 Under both Arizona and New Jersey law, a party's conduct can demonstrate the
3 acceptance of an offer. *In re BFA Liquidation Tr.*, 331 B.R. 907, 911 (D. Ariz. 2005) ("An
4 offer may be accepted in any reasonable manner, unless the offer specifies the manner of
5 acceptance or excludes certain manners of acceptance. Conduct can be a reasonable manner
6 of accepting an offer." (Citing Restatement (Second) of Contracts, § 30 (1981)); *Weichert*
7 *Co. Realtors v. Ryan*, 608 A.2d 280, 284 (N.J. 1992) ("An offeree may manifest assent to
8 the terms of an offer through words, creating an express contract, or by conduct, creating
9 a contract implied-in-fact."). Plaintiff employed the Defendant lawyers on a multitude of
10 litigation matters for several years. Despite not signing the amended engagement
11 agreement, he enjoyed the benefits of their services and signed previous engagement
12 agreements. The Court concludes that the forum selection clause in the 2016 agreement
13 applies to Plaintiff, even though he did not sign the document.

14 It should not come as a surprise that Defendants included a contractual provision
15 mandating the adjudication of disputes in New Jersey. Plaintiff signed the 2015
16 engagement agreement, which included a virtually identical forum selection clause. (Doc.
17 15-2 at 3.) Plaintiff's lawyers are based in New Jersey. As Defendants' counsel emphasized
18 at oral argument, Plaintiff sought out Defendants' work and continued to hire them for
19 Arizona-based litigation matters. And, importantly, Plaintiff sought Defendants' advice on
20 the allocation of funds issue that undergirds his allegations in this lawsuit. The Court
21 therefore rejects Plaintiff's various arguments that the forum selection clause is invalid.

22 **B.**

23 The question remains whether the present controversy falls within the scope of the
24 forum-selection clause. The Court "appl[ies] federal contract law to interpret the scope of
25 a forum-selection clause even in diversity actions, such as this one." *Yei A. Sun v. Advanced*
26 *China Healthcare, Inc.*, 901 F.3d 1081, 1086 (9th Cir. 2018). "[G]eneral principles for
27 interpreting contracts" should guide the Court's review of the forum-selection clause
28 language. *Id.* (quoting *Doe I v. AOL LLC*, 552 F.3d 1077, 1081 (9th Cir. 2009) (per

1 curiam)).

2 The forum-selection clause provides that “any disputes that arise out of this
3 Agreement will be resolved according to the laws of the State of New Jersey.” (Doc. 15-3
4 at 5.) Plaintiff relies on the phrase, “arise out of this Agreement,” contending that the clause
5 is limited to claims limited to the four corners of engagement agreement, such as those
6 relating to the performance and enforcement of the agreement’s terms. Defendants argue
7 that the clause is broader in scope but, even if it is limited as Plaintiff suggests, that limited
8 reading encompasses claims relating to the quality of legal services performed under the
9 engagement.

10 Plaintiff correctly observes that the Ninth Circuit’s rule is that forum-selection
11 clauses with such language as “‘arising out of’ a particular agreement apply only to
12 disputes ‘relating to the interpretation and performance of the contract itself.’” *Yei A. Sun*,
13 901 F.3d at 1086 (quoting *Cape Flattery Ltd. v. Titan Mar., LLC*, 647 F.3d 914, 922 (9th
14 Cir. 2011)). “By contrast, forum-selection clauses covering disputes ‘relating to’ a
15 particular agreement apply to any disputes that reference the agreement or have some
16 ‘logical or casual connection’ to the agreement.” *Id.* (quoting *John Wyeth & Bro. Ltd. v.*
17 *CIGNA Int’l Corp.*, 119 F.3d 1070, 1074 (3rd Cir. 1997) (Alito, J.)). The forum-selection
18 clauses here do not use the expansive “relating to” phrasing.

19 But the Court need not parse the forum-selection clause language beyond Plaintiff’s
20 own interpretation. Plaintiff hired Defendants to provide legal services. All the engagement
21 agreements, including the amended agreement, specify that Defendants represented
22 Plaintiff in “various Actions filed by and against you,” while identifying several of them.
23 (Doc. 15-2 at 1; Doc. 15-3 at 2.) The agreements also say that the “Law Firm agrees to
24 provide you with conscientious, competent, and diligent services an at all time will seek to
25 achieve solutions which are just and reasonable to you.” (Doc. 15-2 at 3; Doc. 15-3 at 4.)

26 In this lawsuit, Plaintiff charges that Defendants gave him bad legal advice.
27 Accepting his factual allegations as true, and assuming for this analysis that his claims
28 against Defendants are meritorious, the Court finds that the claims indeed arise out of the

1 engagement agreements. Defendants owed Plaintiff a contractual duty to perform
2 “conscientious, competent, and diligent [legal] services.” Plaintiff’s claims here implicate
3 this duty, particularly in the realm of competency.

4 Likewise, Plaintiff’s argument that the forum-selection clause does not apply
5 because the engagement agreements do not specify legal representation for Plaintiff’s
6 divorce proceedings fails. This argument aims to separate Defendants’ allegedly faulty
7 advice from the lawsuits listed in the Parties’ engagement agreements. True, Defendants’
8 advice may have caused an adverse finding by the Arizona Superior Court in Plaintiff’s
9 divorce proceedings. And Defendants were not engaged to represent Plaintiff in his
10 divorce. But the funds that were allegedly insufficiently reserved for his ex-spouse come
11 from Plaintiffs’ mediation recovery against his former business partner. The latter was
12 within Defendants’ scope of legal representation.

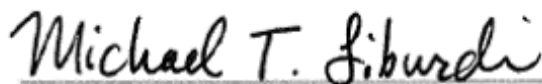
13 For these reasons, the Court finds that Plaintiff has not satisfied his burden to show
14 that the forum-selection clause should not be enforced. The Court will enforce the forum-
15 selection clause as to the claims brought in this matter.

16 **VI.**

17 **IT IS THEREFORE ORDERED** that Defendants’ Motion to Transfer Venue
18 (Doc. 15) is **GRANTED**.

19 **IT IS FURTHER ORDERED** that the Clerk of Court shall **TRANSFER** this
20 action to the United States District Court for the District of New Jersey for all further
21 proceedings.

22 Dated this 10th day of January, 2024.

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25 Michael T. Liburdi
26 United States District Judge
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